

# Election Law and Civil Discourse: The Promise of ADR

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On Jan. 8, 2011, a seemingly deranged man opened fire at a “Congress on Your Corner” event featuring Representative Gabrielle Giffords in Tucson, Arizona.<sup>1</sup> In the wake of this tragedy, the country questioned whether the extreme partisan discourse of recent memory had, in some way, contributed to the unfortunate incident.<sup>2</sup> President Obama delivered a much-heralded speech in which he encouraged the country to bridge its differences and tame our public discourse:

[A]t a time when our discourse has become so sharply polarized—at a time when we are far too eager to lay the blame for all that ails the world at the feet of those who happen to think differently than we do—it’s important for us to pause for a moment and make sure that we’re talking with each other in a way that heals, not in a way that wounds.<sup>3</sup>

A few weeks later, the President echoed this sentiment in his State of the Union address: “Amid all the noise and passion and rancor of our public debate, Tucson reminded us that no matter who we are or where we come from, each of us is a part of something greater—something more consequential than party or political preference.”<sup>4</sup> Although the State of the Union has become extremely partisan recently—to the point where Republican Congressman Joe Wilson heckled President Obama in 2009 by

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<sup>1</sup> Marc Lacey & David M. Herszenhorn, *Congresswoman is Shot in Rampage Near Tucson*, N.Y. TIMES, Jan. 9, 2011, at A1.

<sup>2</sup> Nathan Thornburgh, *Violent Rhetoric and Arizona Politics*, TIME (Jan. 8, 2011), [www.time.com/time/nation/article/0.8599.2041408.00.html](http://www.time.com/time/nation/article/0,8599,2041408,00.html).

<sup>3</sup> Barack Obama, President, U.S., Remarks by the President for the Victims of the Shooting in Tucson, Arizona, Jan. 12, 2011, *available at* <http://www.whitehouse.gov/the-press-office/2011/01/12/remarks-president-barack-obama-memorial-service-victims-shooting-tucson>.

<sup>4</sup> Barack Obama, President, U.S., Remarks by the President in State of Union Address, Jan. 25, 2011, *available at* <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

yelling “You lie!” in the middle of his speech and Supreme Court Justice Samuel Alito visibly mouthed “not true” in response to the President’s statements the following year<sup>5</sup>—the 2011 State of the Union took on a muted tone. Instead of sitting with their partisan brethren, many members of Congress sat next to a political opponent in an effort to symbolize the spirit of working together.<sup>6</sup> The strategy seemed to work: observers noted the subdued tone of the applause and “warmer” feeling among the legislators.<sup>7</sup>

Shortly after this show of national bipartisanship, the Illinois Supreme Court issued a high-profile decision regarding whether Rahm Emanuel, President Obama’s former Chief of Staff, was eligible for the Chicago mayoral ballot.<sup>8</sup> Aside from the legal analysis, one aspect of the decision stood out: the extremely rancorous language the court used in chastising the lower court’s opinion.<sup>9</sup> The court, echoing Emanuel’s petition for review, scolded the appellate court for its “mysterious” analysis in making up a “previously unheard-of test” that the lower court failed to explain.<sup>10</sup> The language of the high court’s decision was so pointed that two justices specially concurred largely to distance themselves from the majority’s tone toward the lower appellate court.<sup>11</sup>

The contrast of these two events—the national call to unity after a terrible tragedy and the overt negative tone of the Emanuel decision shortly thereafter—is stark. They demonstrate a disturbing trend: national political discourse is already caustic, and courts can exacerbate this underlying political animosity by including biting negative language when deciding election law cases.

This Symposium explored the potential promises of alternative dispute resolution (“ADR”) for resolving election law disputes. Both election law and ADR scholars opined on how ADR can help to achieve various goals for deciding contentious election law cases. My focus in this essay is narrower: I suggest that employing some features of ADR to resolve election disputes can help to improve the civil discourse of our elections and our political culture. That is, certain aspects of ADR can assist in reducing caustic

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<sup>5</sup> Kathleen B. Hennessey, *State of the Union: Lawmakers Strike a More Civil Note*, L.A. TIMES, Jan. 26, 2011, at A19.

<sup>6</sup> Jennifer Steinhauer & Carl Hulse, *For One Night, Lawmakers Forgo Seating by Party Affiliation*, N.Y. TIMES, Jan. 26, 2011, at A15.

<sup>7</sup> Hennessey, *supra* note 5.

<sup>8</sup> Maksym v. Bd. of Election Comm’r of the City of Chi., 950 N.E.2d 1051 (Ill. 2011).

<sup>9</sup> See *infra* text accompanying notes 19–27.

<sup>10</sup> Maksym, 950 N.E.2d at 1063.

<sup>11</sup> *Id.* at 1066.

language in election law judicial decisions, in the media's reporting of election disputes, and among the public overall.

In previous work, I have identified six goals we should seek to achieve in creating mechanisms for resolving election law issues: timeliness, accuracy, legitimacy, minimization of ideology, preservation of proper judicial roles (judicial economy), and signaling.<sup>12</sup> This essay advances a seventh goal: greater civility in election law decisions. ADR techniques—with their foundation in cooperation and collaboration—provide one path to achieving that end.

Part I reviews the way in which courts both reflect and contribute to charged discourse when rendering election law decisions. I examine examples from recent election law cases to show that courts are not immune from—and may even contribute to—the acerbic political climate of our culture. Part II examines ADR's general framework, discussing how ADR leads to better relations between parties as they work together to fashion a reasonable solution. Part III suggests that incorporating concepts from ADR into the election law world can help to reduce negative court language and therefore improve political discourse.

## I. DISCOURSE IN ELECTION LAW JUDICIAL OPINIONS

Election law cases are unique in that they require courts to decide inherently political issues.<sup>13</sup> Unlike a run-of-the-mill tort or contract case, election law disputes ask the judiciary to make rules that shape political power and the structure of democracy.<sup>14</sup> Although there are certainly other

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<sup>12</sup> See Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433 (2011).

<sup>13</sup> See Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 376–77 (2007) (“Elections, of course, are inherently political enterprises. Their appropriately competitive nature intensifies the partisanship of the political battles they generate.”); cf. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 650 (2008) (explaining that “it seems fair to expect that the mass public’s perception of courts as above politics will gradually erode if highly partisan election-law issues become a recurring part of the judicial docket and judges consistently take ‘their’ respective party’s side in answering the question presented.”).

<sup>14</sup> See Richard H. Pildes, *The Constitutionalization of Democratic Politics—The Supreme Court, 2003 Term*, 118 HARV. L. REV. 28, 42 (2004) (“Democratic systems are typically justified by their ability to realize a variety of aims: to secure political stability; to express the equal moral status of all citizens; to ensure that the exercise of coercive political power is accountable through elections that select and reject those who hold power; to enhance (some would say maximize) the welfare of citizens by making policies

areas of the law that present ideological issues and lead judges to use harsh language,<sup>15</sup> election law decisions are prone to exhibit partisan rhetoric precisely because of the nature of the issues involved. They are therefore uniquely positioned to contribute to overall negative civic discourse.

A brief review of recent election law judicial opinions bears this out. The decision involving whether Rahm Emanuel, President Obama's former Chief of Staff, met the residency requirements for the Chicago mayoral ballot is a prime example. The Chicago Board of Elections and the trial court both ruled that Emanuel had not rescinded his Chicago residency when he moved to Washington, D.C. to serve the President.<sup>16</sup> The appellate court reversed, 2-1, with the dissent offering a scathing critique of the majority's analysis,<sup>17</sup> chastising the appellate majority for exhibiting a "careless disregard for the law" and stating that the result was a "figment of the majority's imagination" based on the "whims of two judges."<sup>18</sup>

The Illinois Supreme Court, in reversing and holding that Emanuel could appear on the ballot, followed the dissent's negative tone. Some poignant examples include:

- "[U]ntil just a few days ago [when the appellate court issued its decision], the governing law on this question had been settled in this State for going on 150 years."<sup>19</sup>
- "The appellate court left it to the reader to discern . . ." the distinction it made in its analysis,<sup>20</sup> and "the court never explained what it meant by these terms."<sup>21</sup>

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responsive to their interests; to enable sound decisionmaking through the generation of necessary information; and to unleash individual energy in other spheres as a result of the sense of efficacy that participation in self-government generates.") (citation omitted).

<sup>15</sup> See, e.g., Stephen A. Newman, *Political Advocacy on the Supreme Court: The Damaging Rhetoric of Antonin Scalia*, 51 N.Y.L. SCH. L. REV. 907, 908 (2006-07) ("Written opinions of the Supreme Court in important constitutional cases influence not only the direction of the law, but the mood and tone of the nation's politics. . . . In this sense, the rhetoric of the justices inevitably becomes politicized, that is, mixed into the brew of policy, law, partisan debate, statesmanship, and occasionally, leadership, that constitutes our political life . . .").

<sup>16</sup> *Maksym*, 950 N.E.2d at 1066.

<sup>17</sup> See *Maksym v. Bd. of Election Comm'r of the City of Chi.*, 942 N.E.2d 739, 757-58 (Ill. App. Ct. 2011).

<sup>18</sup> *Id.* at 758.

<sup>19</sup> *Maksym*, 950 N.E.2d at 1058.

<sup>20</sup> *Id.* at 1055 n.1.

- The appellate court “announced that it was no longer bound by any of the law cited above, including this court’s decision in [a prior analogous case], but was instead free to craft its own original standard for determining a candidate’s residency.”<sup>22</sup>
- “How, exactly, [the appellate court’s analysis] fosters consistency and harmony is unclear, and the appellate court makes no effort to explain.”<sup>23</sup>
- The court’s analysis was “somewhat mysterious.”<sup>24</sup>
- “[T]he court made no attempt to explain what its standard means.”<sup>25</sup>
- “[T]he entire appellate court opinion can be read as nothing more than an extended exercise in question begging ... .”<sup>26</sup>
- The Illinois Supreme Court was required to make “an assessment of whether the appellate court was justified in tossing out 150 years of settled residency law in favor of its own preferred standard. We emphatically hold that it was not.”<sup>27</sup>

This is pretty stark language. The Illinois Supreme Court could have simply stated that the appellate court was incorrect and pointed out the ways in which the lower court’s analysis was flawed. Instead, the court engaged in what amounted to judicial name-calling and mud-slinging, construing the lower court’s opinion as “mysterious” and ultimately suggesting that the court was purposefully flouting clear precedent to decide the case how it wanted.<sup>28</sup>

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<sup>21</sup> *Id.* at 1056.

<sup>22</sup> *Id.* at 1058.

<sup>23</sup> *Id.* at 1062.

<sup>24</sup> *Id.* at 1063.

<sup>25</sup> *Maksym*, 950 N.E.2d at 1063.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 1058.

<sup>28</sup> *Id.* at 1063.

Indeed, two justices specially concurred largely because they did not want to join an opinion with the majority's "unfortunate" tone.<sup>29</sup> These justices also criticized the dissenting opinion below for its "inflammatory statements."<sup>30</sup> Noting that the media had repeated these sentiments, the concurring justices proclaimed that "[i]nflammatory accusations serve only to damage the integrity of the judiciary and lessen the trust which the public places in judicial opinions."<sup>31</sup>

This kind of language is not isolated among election law decisions. Election law judicial opinions often include scathing remarks between the judges that are unnecessary and unproductive. Perhaps judges are unable to help themselves when issuing an opinion that is inherently partisan because the decision ultimately determines (or at least significantly impacts) an election. Consider Justice Stevens's dissent in *Bush v. Gore*:

What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.<sup>32</sup>

Justice Stevens no doubt used this rhetorical flourish to make a point: he believed that the majority's decision was based on a mistrust of the judiciary that he felt was misguided. But in issuing this statement, and in using this kind of language, he contributed to the preexisting corrosive political atmosphere surrounding the disputed presidential election by suggesting that partisanship drove the majority's resolution of the case.

These tactics are by no means confined to cases that decide contested elections or to liberal or conservative judges. For example, Chief Justice Roberts, when discussing whether an elected judge must recuse himself or

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<sup>29</sup> *Id.* at 1067 (Freeman and Burke, JJ., specially concurring).

<sup>30</sup> *Id.*

<sup>31</sup> *Maksym*, 950 N.E.2d at 1068.

<sup>32</sup> *Bush v. Gore*, 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting).

herself in a case involving that judge's donors, criticized the majority's opinion requiring recusal as "so much whistling past the graveyard. . . . The déjà vu is enough to make one swoon. . . . [The Court's decision] will . . . bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts."<sup>33</sup>

Similarly, Justice Stevens, in the recent major campaign finance case *Citizens United*, chastised the majority's opinion for being "backwards" and representing a "rejection of the common sense of the American people."<sup>34</sup> Chief Justice Roberts responded that the dissent's approach was "quite perplexing."<sup>35</sup>

The public reaction to *Citizens United* was extremely strong among both supporters and opponents of the decision. Those who disagreed with the outcome claimed that the Court had opened the door for large corporations to run the country;<sup>36</sup> those who thought that the Court had ruled correctly were effusive in their praise for the opinion as upholding First Amendment rights against those who would seek to "ban" speech.<sup>37</sup> Even President Obama and Justice Alito had a particularly public spat over the consequences of the decision during the State of the Union; President Obama claimed that the Court's opinion would allow foreign-owned corporations to influence American elections, and in response (and caught on camera), Justice Alito mouthed, "not true."<sup>38</sup> Although it is impossible to measure empirically, one wonders how much the partisan rhetoric from the Court's opinion contributed to the negative public tone of this debate. The underlying principles are hotly contested, but perhaps the Justices' flippant attitude toward each other in their opinions—repeated in the media<sup>39</sup>—fostered the use of this sort of rhetoric among the nation's leaders and the public at large.

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<sup>33</sup> *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2273–74 (2009) (Roberts, C.J., dissenting).

<sup>34</sup> *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 979 (2010) (Stevens, J., dissenting).

<sup>35</sup> *Id.* at 918 (2010) (Roberts, C.J., concurring).

<sup>36</sup> Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30.

<sup>37</sup> Editorial, *High Court Ruling Protects Speech*, SAN ANTONIO EXPRESS-NEWS, Jan. 26, 2010, at A8.

<sup>38</sup> Adam Liptak, *A Rare Rebuke, in Front of a Nation*, N.Y. TIMES, Jan. 29, 2010, at A12.

<sup>39</sup> Adam Liptak, *Stevens Era, Nearing End, Takes on an Edge*, N.Y. TIMES, Jan. 26, 2010, at A12.

Most recently, the Supreme Court again engaged in public bickering in a campaign finance case. In *Arizona Free Enterprise v. Bennett*,<sup>40</sup> Chief Justice Roberts and Justice Kagan took pointed shots at each other; there are many gems from the opinions one could highlight, but perhaps the most poignant was Justice Kagan's exclamation that although the majority rested its analysis on "three smoking guns," "the only smoke here is the majority's, and it is the kind that goes with mirrors."<sup>41</sup> As Professor Heather Gerken proclaimed:

The majority and the dissent bordered on vituperative. Chief Justice Roberts and Justice Kagan write as if they were exasperated with one another. Each accuses the other of ignoring facts, ignoring doctrine, even ignoring the basic principles undergirding the First Amendment. The two go so far as to invoke each other's rhetorical flourishes ironically, even sarcastically.<sup>42</sup>

Once again, the media took the Justices' lead when reporting the decision: the New York Times explained how Justice Kagan "dissect[ed] the court's willful misunderstanding of the result,"<sup>43</sup> while the Wall Street Journal quoted some of Chief Justice Roberts' more pointed statements and proclaimed it a "shame" that the decision was 5-4 and therefore "too close for comfort."<sup>44</sup>

These examples of negative language in election law opinions are not exhaustive. In disputed cases involving election law, judges ratchet up their rhetoric. To be sure, this practice is not confined to opinions involving

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<sup>40</sup> *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

<sup>41</sup> *Id.* at 2843 (Kagan, J., dissenting). Other examples from this case include both Chief Justice Roberts and Justice Kagan stating that democracy is not a "game" (and thereby implying that the other side thinks it is a game), *id.* at 2826 (maj. op.), 2846 (Kagan, J., dissenting); Justice Kagan asserting that the majority failed to take the Court's First Amendment doctrine seriously, *id.* at 2840; Justice Kagan stating that the Court's response to her points is "difficult to fathom," *id.* at 2840; and Justice Kagan's assertion that the majority omitted any reasoning and "virtually ignored" Arizona's "inescapable logic" in passing the law, *id.* at 2843.

<sup>42</sup> Heather Gerken, *Campaign Finance and the Doctrinal Death Match*, BALKINIZATION, (June 27, 2011), <http://balkin.blogspot.com/2011/06/campaign-finance-and-doctrinal-death.html>. Professor Rick Hasen, in characterizing statements from each opinion, used a single word: "ouch!" See Rick Hasen, *Ouch!*, ELECTION LAW BLOG, (June 27, 2011), <http://electionlawblog.org/?p=19693>; Rick Hasen, *The Dissent's Ouch!*, ELECTION LAW BLOG, (June 27, 2011), <http://electionlawblog.org/?p=19696>.

<sup>43</sup> Editorial, *The First Amendment, Upside Down*, N.Y. TIMES, June 28, 2011, at A22.

<sup>44</sup> Editorial, *Another Political Speech Victory*, WALL ST. J., June 28, 2011, at A14.



election law issues,<sup>45</sup> but it is especially concerning in election law because litigation is now a routine part of campaign strategy. This means that the media will inevitably report on election law judicial decisions as part of its campaign coverage, ultimately contributing to and affecting overall public discourse.

Our country is already deeply polarized on many political issues.<sup>46</sup> When courts decide election law cases, they are either determining the rules of the game or the ultimate outcome of an election.<sup>47</sup> Thus, court decisions contribute to the overall national discussion of who should lead our country. When courts render these decisions with an overtly negative tone, they add to the preexisting caustic political discourse. The media repeat these sentiments when reporting on the decisions.<sup>48</sup> Furthermore, the media usually identify the presumed political affiliation of the judge deciding the case, lending a tenor of perceived partisanship to the decision in the eyes of the public.<sup>49</sup> Echoing the negative tone of the decision and casting the case in a partisan light leads to the type of unproductive public discourse discussed above, especially given that this is often all the public will learn regarding an election law decision.

Indeed, the media has done little to instill confidence in voters. One study demonstrated that the media's coverage of election technology and election reform has been decidedly negative, leading to a corresponding

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<sup>45</sup> See, e.g., Newman, *supra* note 15, at 914–16 (providing examples of Justice Scalia's derisive language in many types of cases).

<sup>46</sup> See MARKUS PRIOR, POST-BROADCAST DEMOCRACY: HOW MEDIA CHOICE INCREASES INEQUALITY IN POLITICAL INVOLVEMENT AND POLARIZES ELECTIONS 214 (2007) ("In uncommon unison, many academics, journalists, and pundits of all political leanings have recently declared that America in the early twenty-first century is more politically polarized than it used to be. . . . Observers like to deplore this partisan 'warfare' for its lack of bipartisan spirit and hostility to compromise."); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 273 (2011) (describing the extreme partisan polarization of the past fifty years).

<sup>47</sup> See, e.g., Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 189 (2008) (allowing states to require voters to show photo identification to vote); see also *In re Contest of General Election Held on Nov. 4, 2008, for Purpose of Electing a U.S. Senator*, 767 N.W.2d 453, 456 (Minn. 2009) (deciding contested U.S. Senate election in Minnesota between Norm Coleman and Al Franken).

<sup>48</sup> See, e.g., Adam Liptak, *Stevens Era, Nearing End, Takes on an Edge*, N.Y. TIMES, Jan. 26, 2010, at A12.

<sup>49</sup> See Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 789 n.99 (2007).

decline in voter confidence.<sup>50</sup> Similarly, errors in the projection of a winner on election night (recall the 2000 presidential election)—as well as other mistakes from the media regarding elections—lead to a less-informed electorate, which “potentially influences voter decisionmaking and contributes to the election of individuals who are not truly representative of the voting constituency.”<sup>51</sup> Add the media’s reporting of negative election law decisions and it is no wonder that overall public discourse surrounding elections has gone downhill. Thus, although courts are not the root cause of the negative tone of our politics, they both reflect and embellish it through their language in election law opinions. The media repeat this negative tone when reporting the decisions, influencing voters’ perceptions of the political process and affecting public discourse.

There are several explanations for the bitter tone of many election law cases. One is that courts in general use strong language when they disagree, and election law is not unique in reflecting this trend. This might be true, but even if election law cases are no different from other cases a court decides in terms of the tone of the decisions, they present a unique problem given the importance of election law litigation in deciding who will run our political institutions, and thus, our country. That is, if elections are the foundation of our democracy<sup>52</sup>—if nothing happens, no laws are passed, and no political debate takes place until we elect our leaders—then negative language in election law judicial opinions taints the foundation of our political society. Because democracy begins at the ballot box, we should be concerned about the tenor of court decisions that have an impact on this foundational principle.

A different theory is that the tone of election law cases is particularly bitter because judges are repeat players with each other and therefore are used to disagreeing on a multitude of cases. When these disagreements become political, judges’ entrenched political predilections inherently seep out in the form of negative language. Professor Foley explains:

[judges] are used to disagreeing about abortion, criminal procedure, and a whole range of topics, including redistricting, campaign finance, and other election-related issues. If faced with a dispute over which candidate won a

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<sup>50</sup> See R. Michael Alvarez, Thad E. Hall & Morgan Llewellyn, *On American Voter Confidence*, 29 U. ARK. LITTLE ROCK L. REV. 651, 659 (2007).

<sup>51</sup> Blake D. Morant, *Electoral Integrity: Media, Democracy, and the Value of Self-Restraint*, 55 ALA. L. REV. 1, 22 (2003).

<sup>52</sup> See, e.g., Rebecca Murray, *Voteauction.net: Protected Political Speech or Treason?*, 5 J. HIGH TECH. L. 357, 357 (2005) (“Free and equal elections are a fundamental foundation of a healthy democracy.”).

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major statewide race, these routinely polarized judges may simply fall into the pattern of disagreeing again in a way that tracks their partisan backgrounds.<sup>53</sup>

By contrast, judges who sit together for the first time to hear a highly-charged dispute might remain “on their best behavior, judicially speaking,” based on “human nature generally, or a specific feature of judicial etiquette” so as to “make a good first impression on their colleagues.”<sup>54</sup>

In addition, litigation breeds distrust. Scholars have demonstrated that the Supreme Court has evinced “hostility” toward litigation in the language of its opinions, ultimately contributing to negative legal discourse<sup>55</sup>:

Decisions limiting punitive damages refer to a perception that damages awards have “‘run wild’”; decisions disallowing lawsuits against state governments portray “a Kafkaesque universe in which the defenseless state is ‘hailed’ into Court or ‘thrust’ by ‘fiat’ and ‘against its will’ into ‘disfavored status’ and ‘subject to the power of private citizens’” – language from Court decisions that . . . pervasively portrays litigation as “mire and unseemliness,” not a legitimate method of dispute resolution.<sup>56</sup>

Professor Siegel explains that, in the wake of *Bush v. Gore*, some scholars have viewed the Rehnquist era as marked by “an aggressiveness of both tone and substance that, depending on one’s perspective, might be characterized as either presumptuousness or bravery.”<sup>57</sup> On top of this, Professor Siegel adds that the Rehnquist Court expressed a profound “hostility towards the institution of litigation and [a] concomitant skepticism as to the ability of litigation to function as a mechanism for organizing social relations and collectively administering justice.”<sup>58</sup> This hostility toward litigation comes through in the Court’s language, which sends negative

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<sup>53</sup> Edward B. Foley, *The McCain v. Obama Simulation: A Fair Tribunal for Disputed Presidential Elections*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 471, 505 (2010).

<sup>54</sup> *Id.* Professor Foley made these observations in the context of a simulation of an election law dispute that involved a specially-created three-judge panel.

<sup>55</sup> Andrew Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1108 (2006).

<sup>56</sup> Scott Moss, *Fighting Discrimination While Fighting Litigation: A Tale of Two Supreme Courts*, 76 FORDHAM L. REV. 981, 1003 (2007) (citing Siegel, *supra* note 55).

<sup>57</sup> Siegel, *supra* note 55, at 1104.

<sup>58</sup> *Id.* at 1108.

signals about the role of the judiciary in resolving disputes.<sup>59</sup> In election law, this sentiment contributes to the already hostile environment these cases encompass.

Another explanation for negative discourse in these cases is that judges are inherently political, and it is impossible for them not to revert to their partisan leanings when deciding a case about political power. This pervades the language they use. People are passionate and employ heated rhetoric when debating politics, and judges are no different.<sup>60</sup> For example, Supreme Court campaign finance cases have been particularly heated recently, and it may be because the Justices recognize:

this is a doctrinal death match between two incompatible world views. The justices in these cases cannot agree on the basic premises undergirding campaign finance doctrine. . . . The justices know it's a fight to the finish, and they are writing their opinions accordingly. The stakes are high, and so is the rhetoric.<sup>61</sup>

That is, judges use partisan and negative language in cases involving ideological issues because they are human and must decide winners and losers in a case that allocates political power.<sup>62</sup> The sharper the ideological divide and lack of common ground, the greater the rhetoric.

Partisanship and rancor among judges is particularly acute for elected state judges, who are required to run in an election to secure and retain their positions.<sup>63</sup> A federal judge recently lamented the “marked decline in the Wisconsin Supreme Court’s perceived ability to function collegially,” which has coincided with the “explosion” of campaign expenditures for Wisconsin

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<sup>59</sup> *Id.* at 1114 (explaining that the Rehnquist Court exhibited “attitudinal orientation against litigation, an instinctive skepticism that is triggered whenever the proposed disposition of a case requires the extensive, aggressive, or creative use of the courts or the judicial power”).

<sup>60</sup> See Solimine, *supra* note 49, at 789 n.99 (explaining that the public often assumes that federal judges vote in partisan ways in election law cases).

<sup>61</sup> Heather Gerken, *No Middle Ground*, N.Y. TIMES, June 27, 2011, <http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/no-middle-ground-on-campaign-finance-law>.

<sup>62</sup> See generally Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008) (finding that judges in Voting Rights Act cases tend to vote in partisan ways).

<sup>63</sup> Justice Sandra Day O’Connor, *Keynote Address: State Judicial Independence—A National Concern*, 33 SEATTLE U. L. REV. 559, 564–65 (2010) (“Ask yourselves whether, as a litigant, you would want to be standing in front of a judge who faced an upcoming election if your cause was legally right but politically unpopular.”).

Supreme Court elections.<sup>64</sup> This lack of collegiality and “unseemly public disputes” have “severely harmed the reputation of [the] court.”<sup>65</sup> Thus, for elected judges, the devolvement of political discourse is also traceable to the method by which they obtain their seats.

Ultimately, courts are not the cause of the extreme partisanship of our country, but they are not helping either. Although negative discourse is not limited to election law cases, it poses a problem in election law precisely because this is the area in which the public is most likely to exhibit ideological divisions. Caustic language in court decisions is thus a factor that contributes to our increasingly partisan society. When courts decide election law cases and snipe at each other or are otherwise not collegial, they contribute to the already negative tone of our political discourse. Assuming, as a normative matter, that we want to reduce partisan rhetoric in our elections, then we should think about how courts contribute to this problem and what alternatives we might employ to avoid negative discourse when resolving election law disputes.

## II. ADR’S COLLABORATIVE APPROACH

Alternative dispute resolution starts with a fundamentally different premise than litigation: cooperation and collaboration are possible while resolving a dispute. “The principles behind Alternative Dispute Resolution (ADR), such as value creating as opposed to value claiming, are illustrative of a humanistic approach to legal problems. The principles of ADR [involve] cooperation, compromise, and continuance.”<sup>66</sup> ADR is thought to be mutually beneficial to all involved: “ADR will often connote notions of something better than the traditional litigation process: more accessible and understandable to the layperson, less adversarial, expensive, and time-consuming, and more likely to produce an outcome that matches the interests of the disputants.”<sup>67</sup> Stated differently, “[t]he purpose of dispute systems design is to offer the parties maximal choice and assistance in finding the best way to resolve their dispute for mutual benefit, if possible, and at the

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<sup>64</sup> Wis. Right to Life Political Action Comm. v. Brennan, No. 3:09-cv-00764-wmc, 6 n.3 (W.D. Wis. Mar. 31, 2011).

<sup>65</sup> *Id.*

<sup>66</sup> Virginia Brown, *Revisiting the Public Policy Exception to the Employment-at-Will Doctrine Following Thibodeau v. Design Group One Architects: Applying an Ethic of Care Analysis*, 3 CONN. PUB. INT. L.J. 295, 311 n.53 (2004).

<sup>67</sup> Deborah R. Henslera, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1594 (1995).

lowest cost in time, money, and relationship.”<sup>68</sup> ADR, which incorporates concepts of “common sense and flexibility . . . involves the use of a wider array of approaches to resolve disputes than the traditional and often more costly methods of adversarial litigation and administrative adjudication.”<sup>69</sup>

ADR is infused with “harmony ideology,” defined as “the belief that harmony in the guise of compromise or agreement is ipso facto better than an adversary posture.”<sup>70</sup> Professor Nader traces the rise of ADR and its notions of “harmony” in part to Chief Justice Burger:

The Chief Justice warned that adversarial modes of conflict resolution were tearing the country apart, and that there had to be a better way. He claimed that Americans were inherently litigious, and that ADR was more civilized than the adversary process. His “Isn’t There a Better Way?” speeches followed the peremptory style of assertive rhetoric, grounding the use of arbitration with reference to the time of Homer and Athenian law. Pointing to the early uses of arbitration, he said lawyers should serve as healers, rather than warriors, procurers, or hired guns. He also repeated that Americans were the most litigious people on the globe. During his time as Chief Justice, Burger continued to speak about lawyers as healers, and plaintiffs as patients needing treatment; there was little talk of rights, remedies, injustice, prevention, or unequal power.<sup>71</sup>

For example, Chief Justice Burger explained that “[a] common thread pervades all courtroom contests: lawyers are natural competitors, and once litigation begins they strive mightily to win using every tactic available.”<sup>72</sup> He issued a call to action to:

use the inventiveness, the ingenuity, and the resourcefulness that have long characterized the American business and legal community to shape new tools<sup>73</sup> [in such a way that] can produce an acceptable result in the shortest

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<sup>68</sup> William L. Ury, *Foreword* to CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* ix (1996).

<sup>69</sup> CATHY A. CONSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS* 33 (1996).

<sup>70</sup> Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 3 (1993).

<sup>71</sup> *Id.* at 6.

<sup>72</sup> Warren Burger, *Isn’t There a Better Way? Remarks at the Mid-Year Meeting of the American Bar Association* (Jan. 24, 1982), in 68 A.B.A. 274, 275 (1982).

<sup>73</sup> *Id.* at 276.

possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about.<sup>74</sup>

Thus, one perceived advantage of ADR processes is that they are “more satisfying and more private, produce better outcomes, and contribute to a more civil society through less contentious methods of dispute resolution.”<sup>75</sup> Creation of a non-litigation dispute system in various contexts leads to “(1) less lost time and money to resolve a conflict, (2) fewer missed commercial opportunities, and (3) fewer outbreaks of violence and decreased resort to power struggles.”<sup>76</sup> Meanwhile, alternative dispute systems “can enhance communication and increase party satisfaction with the process and result.”<sup>77</sup>

The three main pillars of alternative dispute resolution are arbitration, mediation, and negotiation.<sup>78</sup> Although each have different approaches, they share an underlying premise of compromise between the parties.<sup>79</sup> One of the reasons that people agree to use alternative dispute resolution is that they know they will be interacting with the opposing side in ongoing relationships, and thus there is an incentive to work together in a spirit of collaboration. As one commentator explains, “arbitrators [in the entertainment industry] understand that the parties often have ongoing relationships and they can maintain an atmosphere conducive to continuing positive working relationships.”<sup>80</sup> Similarly, practitioners recognize that “[a]rbitration can lead to positive results for the resolution of business disputes, including less adversarial relationships, faster decisions, and lower dispute resolution costs.”<sup>81</sup> In fact, lawyers routinely state that they prefer

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<sup>74</sup> *Id.* at 274.

<sup>75</sup> Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justices*, 47 UCLA L. REV. 949, 963 (2000).

<sup>76</sup> Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 179 (2007).

<sup>77</sup> *Id.*

<sup>78</sup> See Stephen J. Ware & Sarah Rudolph Cole, *Introduction: ADR in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 589, 590 (2000) (“Three processes of dispute resolution—arbitration, negotiation, and mediation—are the Big Three of alternative dispute resolution.”).

<sup>79</sup> See Kirk W. Schuler, Note, *ADR’s Biggest Compromise*, 54 DRAKE L. REV. 751, 754 (2006) (“ADR is essentially a compromise.”).

<sup>80</sup> Linda Bartlett, *Lights, Camera, Action! Arbitration in the Entertainment Industry*, 61 DISP. RESOL. J. 48 (Nov. 2006-Jan. 2007) (internal quotation marks and citation omitted).

<sup>81</sup> Scott D. Marrs & Sean P. Milligan, *What You Always Wanted To Know About Arbitration: Five Arbitration Issues Recently Decided By The Courts*, 73 TEX. B. J. 634, 634 (2010).

invoking ADR to resolve lawsuits, and those who use ADR methods overwhelmingly respond that they would like to employ the procedures again.<sup>82</sup> Similarly, one study demonstrated that attorneys involved in a summary jury trial procedure believed that it “has great potential for enhancing communications between attorneys and their clients over acceptable settlement offers,” particularly when the parties enter the process with a cooperative spirit.<sup>83</sup>

Certainly, as one moves along the spectrum of ADR, the underlying premise of cooperation changes. Negotiation is the most collaborative of the alternative dispute resolution systems, as the parties try to compromise by themselves to reach an agreement.<sup>84</sup> Mediation is still cooperative, but the parties use a third party to facilitate negotiations without giving that third party any power to decide the dispute.<sup>85</sup> Arbitration is the most adversarial, as the parties present their positions to a third party who will resolve the case.<sup>86</sup> All three of these dispute resolution techniques are less adversarial than traditional litigation.<sup>87</sup>

ADR processes achieve greater cooperation and collaboration through several techniques. Negotiation and mediation are highly collaborative because the parties work together to reach an amicable resolution. “Mediation can be a viable dispute resolution technique because mediation is viewed as conciliatory while litigation is viewed as adversarial.”<sup>88</sup> As one scholar explains,

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<sup>82</sup> See Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 894 n.26 (1991) (citing various statistics that show that 70–90% of attorneys surveyed responded favorably to ADR processes).

<sup>83</sup> James J. Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 218 (1989).

<sup>84</sup> *Id.* (“Negotiation . . . is the most collaborative form of dispute resolution.”).

<sup>85</sup> See William F. Heinze, *Patent Mediation: The Forgotten Alternative in Dispute Resolution*, 18 AIPLA Q.J. 333, 341 (1991) (“The goal of mediation is to help the parties decide for themselves.”).

<sup>86</sup> See Bryant G. Garth, *Challenging the ‘Eternal Nature’ of Global ADR*, 15 ALTERNATIVES TO HIGH COST LITIG. 1, 2 (1997) (“[s]tudents and practitioners of alternative dispute resolution quite naturally emphasize the distinctions among litigation, characterized as adversarial and expensive, mediation, often defined as relatively informal and inexpensive, and arbitration, most often said to resemble litigation.”).

<sup>87</sup> See Schuler, *supra* note 79, at 754.

<sup>88</sup> Michael Fitzgerald & Lynne M.L. Fitzgerald, *Mediation: A Systemic Alternative to Litigation for Resolution of Church Employment Disputes*, 5 ST. THOMAS L. REV. 507, 510 (1993).



Mediation is not merely an alternative, nor a private process . . . , but a discourse that carries legal meaning and which can be used to enforce and implement the Rule of Law, encompassing its highest values. Mediation represents the extreme “alternative” to adjudication, and thus can be used as the paradigm of dispute resolution emphasis in law.<sup>89</sup>

With respect to arbitration, the parties enjoy flexibility in designing a procedure that works best for their dispute.<sup>90</sup> With this flexibility comes greater autonomy, allowing parties to feel that they have a say in how the process is run and a stake in the procedure employed.<sup>91</sup> Indeed, that is one of the basic points of ADR.<sup>92</sup> ADR thus seeks to “transcend the adversarial model, although the ADR field encompasses adjudicative and adversarial processes as well.”<sup>93</sup>

To be sure, criticism of ADR abounds.<sup>94</sup> Systems of alternative dispute resolution may have downfalls: they can be coercive,<sup>95</sup> lead to less just results,<sup>96</sup> are ineffective as case management tools,<sup>97</sup> minimize the

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<sup>89</sup> Michal Albertstein, *Forms of Mediation and Law: Cultures of Dispute Resolution*, 22 OHIO ST. J. ON DISP. RESOL. 321, 322 (2007).

<sup>90</sup> John Arrastia Jr. & Christi L. Underwood, *Arbitration v. Litigation: You Control The Process v. The Process Controls You*, 64 DISP. RESOL. J. 31, 32 (November 2009-January 2010) (“The core concept of arbitration is its flexibility. This means that it is not governed by rigid, detailed rules. The parties have a significant amount of freedom of choice when it comes to designing the process.”).

<sup>91</sup> See *Preston v. Ferrer*, 128 S. Ct. 978, 986 (2008) (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results.’” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985))).

<sup>92</sup> See, e.g., Susanna S. Fodor & Steven C. Bennett, *Arbitrating Commercial Real Estate Lease Disputes*, 65 DISP. RES. J. 90, 91 (May-Oct. 2010–2011) (“Proponents of arbitration cite its efficiency, privacy, cost savings, control, flexibility and less adversarial approach as virtues.”); Keith Finch & Brian S. Wheeler, *Effective and Efficient Arbitration in Virginia*, 9 APPALACHIAN J. OF L. 143, 144 (2009–2010) (“By agreeing to arbitrate, parties can avoid the often heated and stressful battleground of the courtroom and the otherwise inevitable time and expense that goes along with it. . . . Thus arbitration, if handled properly, should afford parties a more efficient, and less adversarial, route to resolution of their disputes than would litigation.”).

<sup>93</sup> Albertstein, *supra* note 89, at 322.

<sup>94</sup> See, e.g., Nader, *supra* note 70, at 7–10.

<sup>95</sup> See *id.* at 12–13.

<sup>96</sup> See *id.*

<sup>97</sup> See Dayton, *supra* note 82, at 951.

importance of vindicating legal rights,<sup>98</sup> and reinforce preexisting imbalances between the parties.<sup>99</sup> I am not suggesting in this essay that ADR is the best mechanism to resolve all election law cases: plenty of ink already has been spilled regarding whether ADR is good or bad for our system of civil justice.<sup>100</sup> Nor am I arguing that it is even possible for ADR to resolve every election law dispute as a practical matter. Instead, I seek to contrast the lack of civility in many election law court decisions with ADR's cooperative foundation. Perhaps, if we think about election law issues in the spirit of ADR's collaborative approach, we can at least temper the overly negative rhetoric of election law court decisions and the media's reporting of them. That is, using ADR techniques for some election law issues might help to infuse election debate with ADR's more cooperative framework.

### III. ADOPTING FEATURES OF ADR FOR ELECTION LAW CASES

In Part I, I demonstrated how election law judicial opinions often include highly caustic language, which, when repeated in the media, can contribute to our overall negative public discourse. In Part II, I explained how systems of alternative dispute resolution start with a foundation of cooperation and are less adversarial than traditional litigation. This part marries these concepts, discussing how, by using the collaborative spirit underlying ADR, we can resolve election law challenges in a less adversarial manner. My goal is not to advocate for the use of ADR in all election law cases.<sup>101</sup> Instead, I hope to encourage election litigants to think about how they can resolve their disputes with greater civility. Indeed, candidates themselves have an incentive to work amicably with their opponents given that they likely will be repeat players with each other, either in future campaigns or while governing. If they can incorporate concepts of ADR into their challenges—by, for example, looking for common ground before going to court—they can demonstrate how election law need not be a completely adversarial area

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<sup>98</sup> See Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 503–04 (1993).

<sup>99</sup> See, e.g., Reuben, *supra* note 75, at 963.

<sup>100</sup> See *supra* notes 66–77.

<sup>101</sup> Another commentator, however, has done just that, suggesting that Congress should enact a statute mandating mediation for all pre-election disputes that occur more than a month before an election and mandatory arbitration for all disputes that arise within one month before an election, on election eve, and after the election. See Erin Butcher-Lyden, Note, *The Need for Mandatory Mediation and Arbitration in Election Disputes*, 25 OHIO ST. J. ON DISP. RESOL. 531, 533 (2010).

of the law. When disputes do reach court, the parties will be used to working together at trying to reach a resolution, which can result in an overall cooperative spirit. Perhaps courts will take notice and use less negative language when resolving the issues, giving the media less fodder for stirring up controversy. This, in turn, will improve our public discourse surrounding elections. There is also a role for courts to play, both in channeling election law disputes to ADR-type processes and in taking care to exhibit greater civility in their written decisions.

How can election litigants proceed with the spirit of ADR when they have a dispute? My general prescription is that parties to an election law contest should attempt to reach agreement on minor issues as soon as they arise, either through private negotiation or more formalized settlement procedures. Additionally, parties should seek to cooperate in crafting ground rules for the campaign. Certainly, some election disputes present issues in which there is no possibility of compromise: in a post-election contest regarding the winner of an election, for example, it is hard to fathom a compromise solution because only one candidate can take office.<sup>102</sup> But there are tons of micro-level disputes that arise throughout the course of an election that ADR can handle. ADR concepts can lead to a less-costly resolution of certain issues without each side having to call in expensive “hired gun” lawyers.<sup>103</sup> Moreover, by resolving these disputes through ADR, the parties will be used to working together and hopefully will approach a court in a more collaborative manner when they need to resort to litigation. Finally, the parties should collaborate ahead of time to agree on a particular process for resolving disputes; “collective participation in creating conflict management processes increases the likelihood that the resulting processes will be used and preferred.”<sup>104</sup> In this way, invoking ADR will allow election litigants to achieve flexibility and “tailor the process to the problem.”<sup>105</sup>

One benefit of invoking ADR for election law disputes is that it can help to avoid litigation altogether and thus eliminate the problem of judges using negative language in their decisions. Another virtue is that it will give the media less fodder for exploiting perceived controversies between the parties. That is, caustic language from a judge legitimizes the media’s reporting of disputes between the candidates. Bitter court decisions give the media

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<sup>102</sup> But see I. Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making*, 9 HARV. NEGOT. L. REV. 253, 283–84 (2004) (advocating for the use of ADR in end-of-life disputes in which there are seemingly only two options: leaving a feeding tube in place or removing the tube).

<sup>103</sup> See Constantino & Merchant, *supra* note 69, at 36.

<sup>104</sup> *Id.* at xv.

<sup>105</sup> *Id.* at 37.

stronger footing to focus on the “horse race” aspects of the campaign. By channeling disputes to ADR, the media has less ability to rest on “official” negative statements from a court about the dispute, which in turn will hopefully improve the tone of news reporting or at least make negative stories less legitimate in the public’s eye. This should have a corollary positive effect on overall civic discourse.

There are several models already in existence for ADR-type resolution of certain election law controversies.<sup>106</sup> Indeed, a handful of states direct disputes under their Help America Vote Act (HAVA) provisions to some form of alternative dispute resolution.<sup>107</sup> Additionally, the Federal Election Commission (FEC) has an Alternative Dispute Resolution Program in which it employs interest-based negotiation strategies and mediation to resolve complaints under the Federal Election Campaign Act and its implementing regulations.<sup>108</sup> As the website for the program explains, its “interest-based” negotiation techniques focus on the parties’ interests instead of positions as “a problem-solving process to collaborate on a solution, in the FEC compliance context, that is specific and appropriate for both the FEC and for the respondent in an administrative complaint or referral.”<sup>109</sup>

Perhaps the ADR method that has had the greatest success is voluntary agreements between candidates regulating certain aspects of their campaigns.<sup>110</sup> In these arrangements, the candidates bargain to determine the parameters of their election practices.<sup>111</sup> For example, elections have involved voluntary campaign finance agreements under which the candidates agree to certain restrictions, such as banning soft money expenditures by political parties and other interest groups.<sup>112</sup> Hillary Rodham Clinton and Rick Lazio agreed to this sort of arrangement for their 2000 U.S. Senate race in New York, and both sides largely complied with the compact.<sup>113</sup>

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<sup>106</sup> Constantino and Merchant identify six broad categories of ADR procedures: preventive, negotiated, facilitated, fact-finding, advisory, and imposed. *See generally id.* at 37–41 (discussing the dynamics of each method).

<sup>107</sup> *See* Butcher-Lyden, *supra* note 101, at Appendix VI.

<sup>108</sup> *See Alternative Dispute Resolution Program*, FEDERAL ELECTION COMMISSION (last visited June 28, 2011), <http://www.fec.gov/em/adr.shtml>.

<sup>109</sup> *Id.*

<sup>110</sup> Todd R. Overman, Note, *Shame On You: Campaign Finance Reform Through Social Norms*, 55 VAND. L. REV. 1243, 1279–80 (2002).

<sup>111</sup> *Id.* at 1279.

<sup>112</sup> *See* John Copeland Nagle, *Voluntary Campaign Finance Reform*, 85 MINN. L. REV. 1809, 1831–38 (2001) (describing several agreements); Overman, *supra* note 110, at 1280–86 (same).

<sup>113</sup> *See* Nagle, *supra* note 112, at 1833–34.

Similarly, Elizabeth Warren and Scott Brown are trying a negotiated agreement limiting outside spending in their 2012 U.S. Senate race in Massachusetts.<sup>114</sup> Voluntary agreements are beneficial because the parties will view them as legitimate, rational, and efficient.<sup>115</sup> Assuming the parties agree on a nonpartisan third party to handle disputes or infractions, these arrangements also eliminate the need to resort to litigation.<sup>116</sup> Thus, voluntary agreements at the beginning of a campaign demonstrate the parties' interest in cooperating, which can help to ratchet down the extreme partisanship that infects the litigation process in election law cases by ultimately reducing election-related litigation.

Parties can also negotiate to ensure a more civil campaign. In the Minnesota Compact of 1996, a coalition of academic, civic, business, and media groups drafted a voluntary agreement that sought to improve campaign discourse.<sup>117</sup> The Compact called on candidates to refrain from misleading attacks and instead to engage in substantive debates. It also asked the media to focus its reporting on substantive issues instead of writing "horse race" stories about projected election outcomes.<sup>118</sup> Although it is impossible to measure empirically, post-election evaluations of the agreement suggest that the Minnesota Compact led to more positive public discourse surrounding Minnesota elections.<sup>119</sup>

Overall, voluntary agreements, particularly regarding campaign finance limitations, have been successful, albeit infrequently invoked.<sup>120</sup> As one commentator notes in advocating for the increased use of voluntary campaign finance reform, "It is more flexible than legal regulations because voluntary agreements can be adapted to the specific circumstances of any particular campaign. It treats changed campaigns as an immediate possibility

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<sup>114</sup> See Matt Taylor, *Mutually Assured Super PAC Destruction In Massachusetts?*, NAT. MEMO, Jan. 24, 2012, <http://nationalmemo.com/article/mutually-assured-super-pac-destruction-brings-detente-massachusetts>.

<sup>115</sup> Overman, *supra* note 110, at 1279. Of course, voluntary agreements also have their shortfalls, including the problem of enforcement and the "Prisoner's Dilemma." *Id.* at 1255–56.

<sup>116</sup> Overman, *supra* note 110, at 1279.

<sup>117</sup> *Id.* at 1282; Nagle, *supra* note 112, at 1836.

<sup>118</sup> Nagle, *supra* note 112, at 1836; Overman, *supra* note 110, at 1282.

<sup>119</sup> Nagle, *supra* note 112, at 1836–37; Overman, *supra* note 110, at 1282 (noting that of the 283 candidates seeking office in Minnesota in 1996, "only five or six departed from their agreement to run 'clean' campaign ads," and that "Minnesota's news media was effective in providing substantive coverage of the issues and critically appraising the candidates' campaign advertisements").

<sup>120</sup> See Nagle, *supra* note 112, at 1812.

rather than a distant goal.”<sup>121</sup> A negotiated agreement between candidates allows the campaigns to collaborate by setting the ground rules before an election becomes too heated, promoting a spirit of cooperation. Assuming that the agreement has a mechanism for resolving disputes or reporting infractions, it also avoids litigation. This, in turn, can help to temper divisive decisionmaking. Moreover, the parties can include the media in the compact to help foster positive reporting about the election.

Another ADR-type strategy for election law that can help to improve public discourse is negotiated rulemaking.<sup>122</sup> This procedure is an alternative to administrative notice-and-comment rulemaking and is analogous to mediation.<sup>123</sup> A third-party neutral serves as a mediator to help the parties create a rule that all will see as beneficial, or at least tolerable given the respective trade-offs.<sup>124</sup> Negotiated rulemaking is appropriate in situations in which the parties will not be able to reach an agreement on their own given their varying incentives.<sup>125</sup>

A virtue of negotiated rulemaking is that there is no immediate threat of arbitration or litigation.<sup>126</sup> Negotiated rulemaking is inherently cooperative between the agency promulgating the rule and the affected parties, leading to a mutually beneficial outcome and the hope of “objectively superior” rules than what is possible using more “competitive tactics.”<sup>127</sup> It also provides greater “empowerment” to individual interests than more adversarial procedures, such as notice-and-comment rulemaking.<sup>128</sup>

Highly partisan election law issues could benefit from negotiated rulemaking, especially because there are so many stakeholders involved, from the candidates themselves to national regulatory bodies to the local election officials who must implement a rule.<sup>129</sup> For example, one area that is

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<sup>121</sup> *Id.* at 1839.

<sup>122</sup> See Sarah Devlin, “*I Lost My Home, Don’t Take My Voice!*” *Ensuring the Voting Rights of the Homeless Through Negotiated Rulemaking*, 2009 J. DISP. RESOL. 175, 183 (2009).

<sup>123</sup> See *id.* at 184.

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> See *id.* at 184, 195.

<sup>127</sup> See Devlin, *supra* note 122, at 185 (citing LINDA BABCOCK & SARA LASCHEVER, WOMEN DON’T ASK: NEGOTIATION AND THE GENDER DIVIDE 165 (Princeton U. Press 2003)).

<sup>128</sup> *Id.* at 184.

<sup>129</sup> *Id.*

ripe for the use of negotiated rulemaking is voter eligibility.<sup>130</sup> Prior to an election, the respective interested groups and individuals could, in conjunction with the governmental agency that has authority to promulgate appropriate rules, use negotiated rulemaking to determine the extent to which voters must affirm their identity at the polls. This mechanism allows for creative solutions. As one commentator explains in the context of verifying the identity and residence of homeless individuals:

Possible solutions that address voter identification requirements might include allowing a person to vote by affirming his identity by affidavit, by providing a social security number even if the homeless person does not possess his social security card, or by issuing the person a specific voter identification card. One possibility for resolving the issue of residency includes allowing homeless voters to claim a park bench or alley as their home for purposes of districting, and providing them with a post office box or other mailing address where they could receive their card and other election-related information. . . . More creative options include creating a "homeless district" comprised not by geography, but by a citizen's status of not having a traditional residence. Because of the inherently complex balance between protecting the rights of the people to express their rights and the interest of the state in protecting the integrity of the government, there have been calls for creative solutions in other areas of election law. This would be no different.<sup>131</sup>

Negotiated rulemaking allows for flexible solutions to issues and fosters consensus-building.<sup>132</sup> This spirit of collaboration will likely spill over into the campaign itself. Parties who are used to cooperating—even when they have adverse interests—necessarily are likely to engage in more positive discourse.<sup>133</sup> Negotiated rulemaking thus provides an alternative to litigation for some election law disputes, which will have the corollary effect of improving public discourse surrounding elections.

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<sup>130</sup> See *id.* at 187 (advocating for the use of negotiated rulemaking in resolving disputes over eligibility of homeless voters).

<sup>131</sup> *Id.* at 194–95.

<sup>132</sup> See *id.* at 187.

<sup>133</sup> Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1262–63 (1997) ("Intuitively, rules developed through a process that seeks the consensus of affected parties at the outset would seem less likely to generate subsequent conflict and litigation.").

Arbitration of election law issues provides another mechanism to foster more positive debate.<sup>134</sup> A common practice in arbitration proceedings is to have each of the parties select one member of the arbitration panel, with those two selecting a third.<sup>135</sup> This process provides a structural guarantee against bias because both sides can choose an arbitrator that each thinks will be most fair to his or her position.<sup>136</sup> The parties also can select arbitrators who are knowledgeable about the issues.<sup>137</sup> Further, arbitration less frequently leads to a published opinion<sup>138</sup>—which can be both good and bad. On the one hand, simply declaring the outcome avoids the possibility of negative language in the opinion and can eliminate damage to the parties' reputations.<sup>139</sup> This in turn minimizes the concern of harmful language infusing the campaign. On the other hand, the public loses the benefit of an explained decision that can serve as precedent and guide future disputes.<sup>140</sup> Nevertheless, if the goal is to enhance civility in election law controversies, this may be a tradeoff we are willing to accept for certain types of issues.

The three strategies discussed above—voluntary agreements, negotiated rulemaking, and election-related arbitration—mirror the typical tools of ADR: negotiation, mediation, and general arbitration. As noted, I do not intend in this essay to advocate the use of these processes for all election law disputes. Indeed, “the method of dispute resolution must be appropriate for the particular dispute or problem; there must be a fit between the process and

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<sup>134</sup> See Christopher Baum, *The Benefits of Alternative Dispute Resolution in Common Interest Development Disputes*, 84 ST. JOHN'S L. REV. 907, 925 (2010) (noting that “[a]rbitration is . . . less contentious than litigation”).

<sup>135</sup> See, e.g., 2007 CPR Rules for Non-Administered Arbitration Rule 5, CENTER FOR PUBLIC RESOURCES (last visited Jun. 20, 2011), <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/600/2007-CPR-Rules-for-Non-Administered-Arbitration.aspx>. Others also have suggested this three-arbitrator panel mechanism for the resolution of election disputes. See, e.g., Butcher-Lyden, *supra* note 101, at 550.

<sup>136</sup> See Michael J. Molony, Jr., *A-mazing! A Due Process Protocol for Mediation and Arbitration of Employment Law Disputes*, 44 LA. B.J. 126, 128 (1996) (explaining that “participation of both parties in the selection of an arbitrator, with the privilege of striking unacceptable arbitrators, [provides] a further safeguard that reduces significantly any claim of potential bias or unfairness of the arbitrator or arbitration panel”).

<sup>137</sup> See Baum, *supra* note 134, at 928.

<sup>138</sup> *Id.* at 926.

<sup>139</sup> *Id.*

<sup>140</sup> See Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 419 (2006) (“The public benefits of judicial resolution [include] published decisions, precedent, and reinforcement of public norms.”).



the problem.”<sup>141</sup> But if there is a way to employ ADR techniques appropriately to resolve election disputes, then an added benefit is the minimization of the negative tone of election law decisionmaking.

Consider the Rahm Emanuel case regarding his Chicago residency, discussed in Part I.<sup>142</sup> Suppose that the Emanuel campaign sat down with his challengers to try to work out a resolution on whether he was eligible for the Chicago mayoral ballot. Obviously, the challengers were trying to kick him off of the ballot because they supported one of his opponents.<sup>143</sup> But the basis of their challenge was that Emanuel had lost his residency by moving to Washington.<sup>144</sup> The purpose of residency requirements is to ensure that the person running for office actually knows the area and his or her prospective constituency.<sup>145</sup> Therefore, maybe the parties could have agreed that Emanuel could satisfy the challengers that he was still a “true” Chicagoan and understood the local issues through another mechanism—perhaps by agreeing to a debate on specific recent local issues or writing an op-ed on his understanding of what had occurred in the city while he was gone. This might seem far-fetched if the challengers’ real goal was to ensure Emanuel would not be on the ballot. But if we take seriously the underlying legal theory and policy behind residency laws—that only those who are truly interested in the area and constituency can satisfactorily serve as a representative to those people<sup>146</sup>—then the parties could have created a negotiated solution to prove that Emanuel met that requirement.

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<sup>141</sup> Constantino & Merchant, *supra* note 69, at 41.

<sup>142</sup> See *supra* Part I.

<sup>143</sup> Monica Davey, *Can You ‘Reside’ in Chicago if You Live Somewhere Else?*, N.Y. TIMES (Jan. 28, 2011), at A3.

<sup>144</sup> *Id.*

<sup>145</sup> See S. Chad Meredith, Note, *Look Homeward Candidate: Evaluating and Reforming Kentucky’s Residency Definition and Bona Fides Challenges in Order to Avoid a Potential Crisis in Gubernatorial Elections*, 95 KY. L.J. 211, 216–17 (2007) (“[r]esidency requirements serve the purpose of ensuring that candidates are ‘exposed to the problems, needs, and desires of the people whom [they are] to govern, and [the requirements] also give[ ] the people . . . a chance to observe [the candidates] and gain firsthand knowledge about [their] habits and character.’ In other words, residency requirements are intended to be a ‘means of achieving the goal of having knowledgeable and qualified people in high public office.’”) (quoting *Chimento v. Stark*, 353 F. Supp. 1211, 1217 (D.N.H. 1973)).

<sup>146</sup> See *id.* at 217; cf. *Zobel v. Williams*, 457 U.S. 55, 70 (1982) (Brennan, J., concurring) (“[t]o be sure, allegiance and attachment may be rationally measured by length of residence—length of residence may, for example, be used to test the bona fides of citizenship—and allegiance and attachment may bear some rational relationship to a very limited number of legitimate state purposes. cf. *Chimento v. Stark*, 353 F. Supp.

Negotiated rulemaking is probably an even better ADR tool for the parties to have used in resolving this dispute, particularly because it could have included the relevant regulatory or legislative body that would have the authority to interpret or change the statutory requirements for candidate eligibility. Emanuel and his challengers could have agreed to a binding rulemaking process to update the Illinois residency laws to take account of those who leave to serve the President. That rule also could consider both the goals behind residency laws and the reality of modern-day travel and communications. All interested groups thus could have had a say in whether it was appropriate for Emanuel to lose his residency status by going to Washington to serve as President Obama's Chief of Staff. The decision likely would be seen as legitimate because it would involve all interested parties in promulgating an appropriate rule.<sup>147</sup> Most importantly, it would have avoided the back-and-forth bickering between different decisionmakers that occurred as the case proceeded through the courts.<sup>148</sup>

Finally, the parties might have agreed to arbitrate their dispute. In the realm of ADR, arbitration is most similar to litigation, so perhaps this would not have completely avoided the public acrimony over the decision.<sup>149</sup> But it might have helped. For one, the parties could have chosen the decisionmakers, which potentially increases the legitimacy of the decision.<sup>150</sup> Additionally, the arbitrators presumably would be knowledgeable in Illinois election and residency law, so perhaps they would not have made the same mistake the Illinois Appellate Court did.

Other examples of situations in which ADR can help to resolve disputes in a more congenial manner than litigation are abundant. Consider the 2010 U.S. Senate race in Alaska. After Election Day, Lisa Murkowski and Joe Miller vigorously disputed whether write-in votes for Murkowski that had minor spelling mistakes counted as valid votes under Alaska law.<sup>151</sup> Instead of waiting for a post-election court battle, however, the parties could have

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1211, 1217 (D.N.H. 1973), summarily aff'd, 414 U.S. 802 (1973) (7-year citizenship requirement to run for governor)").

<sup>147</sup> See Coglianese, *supra* note 133, at 1262 (citing Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 28–31 (1982)).

<sup>148</sup> See *supra* Part I.

<sup>149</sup> See, e.g., Editorial, *Judicial Arrogance*, CHI. TRIB., Jan. 25, 2011, at 14.

<sup>150</sup> Olga K. Byrne, Note, *A New Code of Ethics for Commercial Arbitrators: The Neutrality of Party Appointed Arbitrators on a Tripartite Panel*, 30 FORDHAM URB. L.J. 1815, 1841 (2003) ("A party-appointed arbitrator renders the decision more acceptable because the parties know they have had someone who clearly understands their position on the panel.").

<sup>151</sup> *Miller v. Treadwell*, 245 P.3d 867, 887–88 (Alaska 2010).

entered into a pre-election voluntary agreement regarding which types of misspellings would or would not count, or they could have gone through negotiated rulemaking. Of course, the parties would have needed to invoke these techniques quickly to have a clear rule in place before Election Day, and the standard would have to be consistent with Alaska election law. But having a rule ahead of time—which both parties would have contributed to promulgating—could have avoided the acrimonious post-election litigation.<sup>152</sup>

Even *Citizens United*, probably the most contentious Supreme Court case since *Bush v. Gore*, might have benefited from ADR techniques.<sup>153</sup> The challengers in that case asserted that the independent expenditure limitation in the Bipartisan Campaign Reform Act did not apply to their communication, which was a video-on-demand feature-length movie produced by a nonprofit corporation that received only part of its funds from for-profit corporations.<sup>154</sup> As the dissent noted, there were several as-applied mechanisms that could have exempted the plaintiffs from the reach of the law.<sup>155</sup> Instead of a polarizing Supreme Court decision, then, the parties could have engaged in a form of negotiated rulemaking or interest-based negotiation through the Federal Election Commission to determine whether the law actually should apply to this kind of electioneering communication.

To be sure, there are drawbacks to this proposal. For one, channeling election law disputes into prelitigation ADR procedures might lead to inaccurate decisions if the parties create an agreement that is inconsistent with judicial understanding on an issue.<sup>156</sup> In any event, ADR could be ineffective if the controversy requires the resolution or interpretation of a legal rule or statute.<sup>157</sup> ADR also might embellish inequality between parties, leading to less just results.<sup>158</sup> Moreover, without a legal opinion resolving a

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<sup>152</sup> See Richard Mauer, *Miller Ends Challenge in US Senate Race*, ANCHORAGE DAILY NEWS, Jan. 1, 2011, available at <http://www.adn.com/2010/12/31/1626654/miller-ends-challenge-in-senate.html>.

<sup>153</sup> *Citizens United*, 130 S. Ct. at 876.

<sup>154</sup> See *id.* at 887–88.

<sup>155</sup> See *id.* at 932–38 (Stevens, J., dissenting).

<sup>156</sup> See Edward Bruneta, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1, 41–42 (1987).

<sup>157</sup> Vance K. Opperman, *The Pros and Cons of ADR, Including ADR/Litigation Hybrids*, 1 SEDONA CONF. J. 79, 85 (2000).

<sup>158</sup> Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 584–85 (1997) (noting that “critics charge that ADR’s processes . . . deliver a skewed brand of justice that flouts structural safeguards, ...

case, future parties will not have precedents to rely upon in a subsequent election.<sup>159</sup> Judicial opinions help to make the rules of the game clearer.<sup>160</sup> If parties use ADR to resolve disputes, then courts will not have this opportunity, which is particularly troubling given that the public needs clear rules for administering free and fair elections.<sup>161</sup> Finally, from a practical perspective, it may be unrealistic to expect candidates and campaigns to predict which issues need resolution before an election season is underway.

These concerns may be reasons not to adopt ADR *carte blanche* for election law cases. But I am not arguing for a wholesale application of ADR procedures to election law. Instead, my proposal is that ADR concepts can help to reduce the amount of negative rhetoric in election law decisions both by channeling cases away from the judiciary and by encouraging a cooperative spirit among the litigants if the cases do reach court (which, hopefully, judges will follow in their written opinions). To that end, the ADR strategies outlined above seem imminently suited to achieve this goal. When parties engage in voluntary agreements through negotiated rulemaking, they are by definition collaborating to maximize everyone's interest. In doing so, they are also likely to ratchet down negative rhetoric. The closer the procedure focuses the parties on working together, the more probable their discourse will remain civil. By contrast, arbitration, the ADR procedure that most resembles litigation, is the least likely option to improve political discourse because of its resemblance to litigation.<sup>162</sup> Parties to arbitration must present their case to a panel, and there is a clear winner and loser.<sup>163</sup> As explained above, however, when parties become litigious in the context of a political debate, everyone's language becomes more pointed.<sup>164</sup> Thus, if one of the goals of a resolution system is to improve civic discourse, then we

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exploits inequality of bargaining power, and ultimately fails to provide adequate remedies for weaker parties such as women, minorities, and those with less economic power.”).

<sup>159</sup> See Estlund, *supra* note 140, at 420.

<sup>160</sup> See Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 128 (1994) (“Written law . . . allows for a check of the government and gives the citizens a method to review the government’s application of the law.”).

<sup>161</sup> Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 102 (2009).

<sup>162</sup> See Garth, *supra* note 86, at 1 (explaining that arbitration is similar to “adversarial” litigation).

<sup>163</sup> See Oliver J. Armas, *Setting the Stage for Successful International ADR*, Best Practices for International Alternative Dispute Resolution: Leading Lawyers on Understanding ADR Laws and Policies, Overcoming Challenges, and Succeeding in a Global Setting, 2007 WL 6082207 (2007).

<sup>164</sup> See *supra* Part I.

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should focus on those ADR processes that enable the parties to work together as much as possible.

### IV. CONCLUSION

Judicial decisions are not the cause of our polarized society and highly partisan discourse, but they do not help either. Although channeling more disputes to ADR-type processes will not completely eliminate partisan rhetoric, it can certainly assist. If courts entertain fewer election law cases because the parties work out their differences through alternative means, then there is less ability for the structural processes of litigation to create polarizing decisions with language that inflames the issues. Using techniques underlying ADR in election law can lead to more positive language (or at least less negative language) in the resulting decisions, which will have a corollary effect on how the media reports these controversies. This ultimately will improve our overall political discourse. Thus, when considering new procedures for resolving election law disputes, we should include as an overarching goal a process that will help to improve (or at least will not further derogate) the type of language parties and decisionmakers use. Incorporating concepts such as voluntary agreements, negotiated settlement, and even arbitration into election law disputes is one way to achieve this end.

